(5)

Supreme Court, U.S.
FILED
MAY 10 2001
OFFICE OF THE CLERK

No. 00-6567

IN THE

# Supreme Court of the United States

LARRY DEAN DUSENBERY,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## JOINT APPENDIX

ALLISON M. ZIEVE
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
*Counsel of Record for Petitioner*

BARBARA UNDERWOOD
Acting Solicitor General
Department of Justice
Washington, DC 20530
(202) 514- 2217
*Counsel of Record for Respondent*

**PETITION FOR CERTIORARI FILED: OCTOBER 16, 2000**
**CERTIORARI GRANTED: FEBRUARY 26, 2001**

TABLE OF CONTENTS


| | Page |
|---|---|
| Relevant docket entries | |
| United States District Court for the Northern District of Ohio, Case No. CR86-102A | 1 |
| United States District Court for the Northern District of Ohio, Case No. 95-CV-1872 | 7 |
| United States Court of Appeals for the Sixth Circuit, Case No. 95-4188 | 8 |
| United States Court of Appeals for the Sixth Circuit, Case No. 99-3148 | 10 |
| Affidavit of Steven Pyles (attached to Government's Response), filed June 1, 1995 | 13 |
| Order of Sixth Circuit, Case. No. 95-4188, filed Sept. 27, 1996 | 31 |
| Declaration of James Lawson (Exhibit 2 to Plaintiff's Response to Defendant's Motion for Summary Judgment Together with Plaintiff's Motion to Dismiss), filed Dec. 16, 1996 | 36 |
| Plaintiff's Response to Defendant's Requests for Admission, filed Feb. 20, 1997 | 39 |
| Affidavit of Larry Dean Dusenbery (Exhibit C to Motion for Summary Judgment), filed March 26, 1997 | 44 |
| Transcript of Telephone Deposition of James Lawson, filed July 23, 1997 | 46 |
| Opinion and Order granting motion of United States for summary judgment, filed January 19, 1999 | 55 |
| Opinion of Sixth Circuit, Case No. 99-3148, filed July 10, 2000 | 67 |

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CR-86-102A

LARRY DEAN DUSENBERY,
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

[Criminal Docket Cover Sheet Omitted]

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 4-29-86 | 1 | MINUTES of Proceedings filed. Initial Appearance held. Counsel retained, Request of defendant for a continuance to prepare for a pretrial detention hearing. Pretrial Detention Hearing set for 5-6-86 at 11:00 a.m. Laurie, M. Time: 15 minutes Tape #86-24(072-147) (p 1) |
| 6-24-86 | 25 | MINUTES of proceedings filed. Dowd, J. Zengler, r. Plea of not guilty withdrawn, plea of guilty entered to Count I of indictment. Plea agreement that remaining count be dismissed at sentencing approved by the Court. (Count II) Referred for pre-sentence investigation. Plea agreement placed on the record reflecting this case and CR86-154A: 1. 12 year cap. 2. sentences to run concurrent. 3. Deft. plea to information in CR86-154A and to Count I in CR86-102A. Count II to be dismissed at time of sentencing. Sentencing set for 7-15-86 at 1:00 p.m. Time: 30 min. (1 p) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 7-15-86 | 30 | MINUTES of proceedings filed. Dowd, J. Nunes, r. Sentence: 12 yrs. custody of AG with a special parole term of 6 yrs. to follow. Upon motion of AUSA, Count II of indictment dismissed. Deft. advised of special parole term of 6 yrs. Conferred with counsel and decided to remain on his plea of guilty. Obj. re: presentence report were denied. Oral motion for recommendation for Lexington granted. Time: 30 min. (1 p) |
| 7/28/88 | 36 37 | MOTION of pltf for Court order to destroy seized evidence w/brf. c/m 7/26/88. (3 p) jp |
| 8/10/88 | 37 36 | ORDER that the FBI be permitted to destroy seized evidence presently in their custody as a result of a saizure which took place at 396 Porter Road, Atwater, OH on 4/23/86. DDD EOD:8/10/88. c/m 8/10/88. (1 p) jp |
| 11/12/93 | 74 115 116 | MOTION of dft for retn of property, 116 w/brf & exhs. c/m 11/2/93. (9 p) jp |
| 4/28/94 | 85 | RESPONSE of govt to dft's mot for retn of property. c/m 4/28/94. (2 p) jp |
| 5/9/94 | 86 | REPLY of dft to govt's resp to dft's mot for retn of property w/affvt. c/m 5/9/94. (4 p) jp |
| 5/20/94 | 88 | ORDER that the govt is requested to file a suppl brf by 6/8/94 in resp to dft's mot for retn of all property & funds seized. Dowd, J. c/m 5/20/94. (2 p) fm |
| 7/19/94 | 92 | RESPONE of govt to dft's mot for retn of all property & funds seized. w/attachments c/m 7/19/94 (108p)pm |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/1/94 | 93 | REPLY of dft to govt's resp to dft's mot for retn of all property & funds seized. c/m 7/25/94 (4 p) pm |
| 8/24/94 | 96 | SUPPLEMENTAL REPLY of dft to govt's supplemental resp to dft's mot for retn of all prop & funds seized. c/m 8/21/94 (4 pgs) tl |
| 2/8/95 | 99 | MOTION of dft for lv to suppl F.R.Cr.P. 41(e) mot (attached). c/m 2/4/95. (2 pgs) jr |
| 2/28/95 | 100 | ORDER granting dft's mot for lv to suppl his mot; Ct req govt to suppl resp filed 7/15/94 indicating if a forfeiture action was filed w/respect to currency & if so case number of forfeiture action; if no action to forfeit currency has been filed, Ct req a brf setting forth reasoning of govt as to why Ct should not ord currency retnd to dft; Ct req that suppl be filed by 3/17/95. Dowd, J. c/m2/28/95. (2 pgs) jr |
| 3/15/95 | 103 | SUPPLEMENTAL Response of govt ex/exh. c/m 3/15/95. (40 pgs) jr |
| 3/23/95 | 104 | SUPPLEMENTAL Reply by dft to govt's suppl resp dated 3/15/95. c/m 3/19/95. (3 pgs) jr |
| 4/13/95 | 105 | ORDER directing counsel for govt to file suppl memo on challenged iss of actual ntc, the statutory authority for administrative forfeiture, double jeopardy iss & given fact of forfeiture, does Ct have jurisdiction to adjudicate dft's challenge to the accomplished forfeiture in the confines of cr case or is dft obligated to file a new civil action to re- |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | cover currency on claim that forfeiture action is fatally flawed for lack of ntc; Ct req that said resp by filed by 5/5/95 & dft has lv to file memo in opp by 5/19/95. Dowd, J. c/m 4/13/95. (2 pgs plus 3 pg attachment) jr |
| 6/1/95 | 109 | RESPONSE of govt (re: forfeiture) w/affdvt & exh. c/m 5/31/95. (21 pgs) jr |
| 6/16/95 | 110 | REPLY of dft to govt's 6/1/95 resp w/exh. c/m 6/12/95. (35 pgs) jr |
| 7/19/95 | 111 | REPLY of dft to govt's 7/12/95 suppl citation. c/m 6/16/95. (3 pgs) jr |
| 7/12/95 | 112 | SUPPLEMENTAL CITATION of govt. c/m 7/12/95 (2 pgs) |
| 8/14/95 | 113 | SUPPLEMENTAL CITATION of dft in supp of mot for retn of property. c/m 8/9/95. (2 p) fm |
| 10/5/95 | 115 74 | MEMORANDUM OPINION denying dft's mot for retn of property; the court finds that it lacks jurisdiction for the mot. Dowd, J. c/m 10/5/95. EOD: 10/6/95. (memo 11 p; attach 13 p) fm |
| 10/5/95 | 116 74 | JUDGMENT ENTRY that the dft's mot for retn of property is denied; case dism; case closed. Dowd, J. c/m 10/5/95. EOD: 10/6/95. (1 p) fm (5:95cv1872) |
| 10/27/95 | 117 | NOTICE OF APPEAL by Larry Dean Dusenberry to the USCA for the 6th circuit re judg [116] & [115]. Notice to counsel, USCA & petit. (2 pgs) Fee not required. cm: 5:95CV1872. |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/20/96 | 125 127 | TRUE COPY of mandate from the USCA for the 6th Circuit vacating the District Court's judg & remanding the case for further proceedings [0-1]. Clerk, Green; Guy, Ryan & Moore, Circuit Judges; Dt issd 11/18/96. Filed 9/25/96; USCA #95-4188. (1 pg) |
| 2/20/97 | 135 | RESPONSE of pla USA to dft's req for prodctn of docmts w/exhs. c/m 2/20/97. (8 p) (5:95cv1872) fm |
| 2/20/97 | 136 | RESPONSE of pla USA to dft's interr. c/m 2/20/97. (7 p) (5:95cv1872) fm |
| 2/20/97 | 137 | RESPONSE of pla USA to dft's reqs for adms. c/m 2/20/97. (5 p) (5:95cv 1872) fm |
| 3/26/97 | 138 | MOTION by dft for SJ w/brf & exh. c/m 2/14/97. (33 pgs) (5:95cv1872) jr |
| 3/28/97 | 139 | MOTION by pla for SJ & RESPONSE to dft's mot for SJ w/exh. c/m 3/27/97. (19 pgs) (5:95cv1872) jr |
| 7/25/97 | 147 | TRANSCRIPT of evidentiary hrg before Hon David D. Dowd, Jr. on 7/23/97 at 7:55 a.m. Court Reporter: Caroline Mahnke. (22 p) (5:95cv1872) fm |
| 7/25/97 | 148 | TELEPHONE DISPOSITION of James Curtis Lawson on 7/23/97 at 10:30 a.m. before Hon David D. Dowd, Jr. Court Reporter: Caroline Mahnke. (11 p) (5:95cv1872) fm |
| 8/13/97 | 152 | SUPPLEMENTAL MOTION of petr for SJ w/brf. c/m 8/11/97. (7 p) (5:95cv1872) fm |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/20/97 | 154 | SUPPLEMENTAL brf of pla w/respect to its mot for SJ w/exhs. c/m 8/20/97 (20 p) fm (5:96cv1872) |
| 9/2/97 | 158 | SUPPLEMENTAL brf by dft as to whether certain items may be forfeited as drug proceeds. c/m 8/28/97. (5:95cv1872) fm |
| 3/30/98 | 173 | SUPPLEMENTAL pldg by petr to forfeiture action based on new case law w/exh. c/m 3/28/98. (6pgs) (5:95cv1872) jr |
| 4/6/98 | 174 | RESPONSE by govt to pla's suppl pldg to forfeiture action based on new case law w/exh. c/m 4/3/98. (5 pgs) (5:95cv1872) jr |
| 4/9/98 | 175 | REPLY by petr to govt's resp to suppl pldg to forfeiture. c/m 4/9/98. (2 pgs) (5:95cv1872) jr |
| 7/6/98 | 176 | SUPPLEMENT by petr to forfeiture case based on new case law w/exh. (2 pgs, 2 pgs exh) c/m 6/30/98. (5:95cv1872) jr |
| 1/19/99 | 180 | OPINION and Order granting motion of USA (doc 139) for SJ. Gwin, J. (EODL: 1/20/99) issd: 1/19/99 13pgs |
| 1/19/99 | 181 | ORDER that this Ct grants USA's motion for summary judgment and denies deft, Dusenbery's mot for SJ. Gwin, J. issd: 1/19/99 (EOD: 1/20/99) vk |
| 1/29/99 | 182 | NOTICE OF APPEAL to the USCA fore the 6th Circuit by petr re ord [180] & ord [181]. Fee not paid. (5:95CV1872) cmr (2 pgs) |



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO (Akron)

---

Civil Docket for case #: 95-CV-1872

---

LARRY DEAN DUSENBERY,
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

---

Filed: 08/23/95
Assigned to Judge James S. Gwin
Demand: $0,000
Nature of Suit: 890
Lead Docket: None
Jurisdiction: US Defendant
Dkt # in USDC/NDOH: IS 5:86cr102
Cause: 12:1441 Replevin; Action to recover property

[Case style, parties and counsel omitted]

---

**DOCKET ENTRIES**

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/12/93 | — | MOTION by movant for order for return of property w/brf & exhs in supp. (9 pgs) (tl) [Entry date 08/24/95] |
| 8/24/95 | — | PLEASE REFER TO CRIMINAL DOCKET NO. 5:86cr102 FOR ALL FURTHER DOCKET ENTRIES (tl) |

GENERAL DOCKET
US COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 95-4188 Filed: 11/2/95
Nsuit: 2890 Other Statutory Actions
Dusenberry v. USA
Appeal from: Northern District of Ohio at Akron

Case type information:
1) Civil
2) United States as party
3) federal question

Lower court information:

District: 0647-5 : 95-01872
Trial Judge: David D. Dowd, Jr., Senior District Judg
Date Filed: 8/23/95
Date order/judgment: 10/5/95
Date NOA filed: 10/27/95

Fee status: in forma pauperis

Prior cases: None
Current cases: None

[Case style, parties, and counsel omitted]

| DATE | PROCEEDINGS |
|---|---|
| 11/2/95 | Civil Case Docketed. Notice filed by Appellant Larry Dean Dusenberry. Transcript needed: n 1915a pending in dist. ct. (mmd) |
| 12/26/95 | BRIEF filed by pro se appellant Larry Dean Dusenberry and served by deputy. Copies: 5. Certificate of service date 12/21/95 Number of Pages: 10. [95-4188] (vf) |



| DATE | PROCEEDINGS |
|---|---|
| 1/26/96 | Request to waive oral argument and submit case on the briefs, (waiver on page: v), filed by Gregory C. Sasse for Appellee USA [95-4188] (vf) |
| 1/29/96 | BRIEF filed by Gregory C. Sasse for Appellee USA. Copies: 5. Certificate of service date 1/26/96. Number of Pages: 10. [95-4188] (vf) |
| 2/12/96 | REPLY BRIEF filed by pro se appellant Larry Dean Dusenberry and served by deputy. Copies: 5. Certificate of service date 2/4/96 [95-4188] (vf) |
| 3/4/96 | Appellant MOTION filed to order the United States Attorney to File the Joint Appendix. [1287137-1]. Motion filed by Larry Dean Dusenberry for Appellant Larry Dean Dusenberry. Certificate of service date [95-4188] (tmb) |
| 3/21/96 | APPENDIX filed by Gregory C. Sasse for Appellee USA. Copies: 5. Certificate of service date 3/20/96 [95-4188] (vf) |
| 9/25/96 | ORDER filed: VACATED and remanded [95-4188], pursuant to local rule 9(b)3 [95-4188], decision not for publication pursuant to local rule 24 [95-4188] . Ralph B. Guy, Circuit Judge, James L. Ryan, Circuit Judge, Karen N. Moore, Circuit Judge. (mmd) |
| 11/18/96 | MANDATE ISSUED with no cost taxed [95-4188] (vf) |

GENERAL DOCKET

US COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

Court of Appeals Docket #: 99-3148 Filed: 2/4/99
Nsuit: 1890 Other Statutory Actions
USA v. Dusenbery
Appeal from: Northern District of Ohio at Akron

Case type information:
1) Civil
2) United States as party
3) federal question

Lower court information:

District: 0647-5: 95-01872
Trial Judge: James S. Gwin, U.S. District Judge
Court Reporter: Richard Delmonico
Date Filed: 8/23/95
Date order/judgment: 1/19/99
Date NOA filed: 1/29/99

Fee status: in forma pauperis

Prior cases:
95-4188
Date Filed: **/**/** Date disposed: **/**/** Disposition:

Current cases: None

[Case style, parties, and counsel omitted]

| DATE | PROCEEDINGS |
|---|---|
| 2/4/99 | Civil Case Docketed. Notice filed by Appellant Larry Dean Dusenbery. Transcript needed: n (mmd) |



| DATE | PROCEEDINGS |
|---|---|
| 5/17/99 | BRIEF filed by pro se appellant Larry Dean Dusenbery and served by deputy. Copies: 4. Certificate of service date 5/14/99 Number of Pages: 50. [99-3148] (vf) |
| 6/15/99 | BRIEF filed by Herbert J. Villa for Appellee USA. Copies: 7. Certificate of service date 6/14/99. Number of Pages: 11. [99-3148] (vf) |
| 6/15/99 | Request to waive oral argument and submit case on the briefs, (waiver on page: v), filed by Herbert J. Villa for Appellee USA [99-3148] (vf) |
| 7/12/99 | REPLY BRIEF filed by pro se appellant Larry Dean Dusenbery and served by deputy. Copies: 5. Certificate of service date 7/9/99 [99-3148] (vf) |
| 7/20/99 | APPENDIX filed by Herbert J. Villa for Appellee USA. Copies: 5. Certificate of service date 7/19/99 [99-3148] (vf) |
| 7/10/00 | Per Curiam OPINION filed: AFFIRMED [99-3148], decision not for publication pursuant to local rule 28(g) [99-3148]. Boyce F. Martin, Circuit Judge, Harry W. Wellford, Circuit Judge, Alice M. Batchelder, Circuit Judge. OPINION PUBLISHED 8/10/00 per 8/1/00 Order of the Court. (mmd) |
| 7/21/00 | PETITION for en banc rehearing filed by Larry Dean Dusenbery for Appellant Larry Dean Dusenbery. Certificate of service date 7/20/00. [99-3148] (blh) |
| 8/25/00 | ORDER filed denying petition for en banc rehearing [2191420-1] filed by Larry Dean Dusenbery [99-3148]. Boyce F. Martin, Harry W. Wellford, Alice M. Batchelder, Circuit Judges. (blh) |
| 9/5/00 | MANDATE ISSUED with no cost taxed [99-3148] (dac) |

| DATE | PROCEEDINGS |
|---|---|
| 10/20/00 | U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Larry Dean Dusenbery. Filed in the Supreme Court on 10-16-00, Supreme Ct. case number: 00-6567. [99-3148] (swh) |
| 3/2/01 | U.S. Supreme Court letter filed granting petition for writ of certiorari [2241799-1] filed by Larry Dean Dusenbery [99-3148]. Filed in the Supreme Court on 02-26-01. (swh) |



STATE OF OHIO )
) SS: AFFIDAVIT
CUYAHOGA COUNTY )

I, STEVEN PYLES, being first duly sworn under oath say:

1. I am a paralegal specialist of the Federal Bureau of Investigation assigned to the Cleveland field office. As a part of my official duties, I handle asset forfeiture matters.

2. I have reviewed the forfeiture filed for a Larry Dusenberry which indicate that $21,939.00 in United States currency was forfeited from Mr. Dusenberry.

3. Attachment no. 1 is the Declaration of Forfeiture which indicates that the currency in question was forfeited by the Federal Bureau of Investigation.

4. Attachment no. 2 documents the fact that the F.B.I. relinquished these funds to the Marshal's Service pursuant to forfeiture procedures.

5. Attachment no. 3 documents the Marshal's Service deposit of the money into an asset forfeiture fund account.

6. Attachment no. 4 is the letter which was sent as Notice of Forfeiture.

7. Attachment no. 5 is a copy of the green card on the return receipt which documents that the letter was sent to Larry Dusenberry in the Federal Correctional Facility, Milan, Michigan.

8. Attachment no. 6 is a copy of the green card indicating delivery of the letter to Larry Dusenberry at the 1484 State Rte. 44, Randolf, Ohio address which was signed for by Edward Clause.

9. Attachment no. 7 is a copy of the certified mail envelope indicating that the letter sent to Larry Dusenberry at the 396 Porter Road, Atwater, Ohio address was unclaimed.

10. Attachment no. 8 is a copy of the Advertising Order that the F.B.I. would use to advertise the notice in the *Plain Dealer*.

11. Attachment no. 9 indicates that the notice was run in the *Plain Dealer* on November 20, 1988.

12. Attachment no. 10 indicates that the notice was run in the *Plain Dealer* on November 28, 1988.

13. Attachment no. 11 indicates that the notice was run in the *Plain Dealer* on December 4, 1988.

14. Based on the above, Affiant states that the F.B.I. asset forfeiture file indicates administrative forfeiture of the currency belonging to Larry Dusenberry pursuant to valid notice by virtue of certified mail and advertising in the *Plain Dealer*.

Further Affiant sayeth naught.

/s/ Steven Pyles
STEVEN PYLES

SWORN TO BEFORE ME and subscribed in my presence this 31st day of May, 1995.

/s/ Marguerite V. Vaiginis
Notary Public

Marguerite V. Vaiginis, Notary Public
STATE OF OHIO—Cuyahoga County
My Commission Expires 10/13/97



[Logo] Attachment #1

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535

## DECLARATION OF FORFEITURE

SEIZURE NUMBER: 3170-89-006

On April 23, 1986 the property described below was taken into custody by the Federal Bureau of Investigation for civil forfeiture at Atwater, Ohio, pursuant to Title 21, USC, 881 (6). The initial seizure of the property by _____ occurred on _____ at _____. Notice of this action was sent to all known parties who may have a legal or possessory interest in the property. On November 20, 27, and December 4, 1988, notice of this action was published in The Plain Dealer, Cleveland, Ohio in accordance with 19 USC § 1607.

(Description of Property)

$21,939 in US Currency

As of the date of execution of this form, a petition for remission or mitigation of forfeiture for this property ☐ has ☒ has not been received.

No claim was filed for the property within 20 days from the date of first publication of the advertisement as required. It is hereby declared that the property has been forfeited to the United States under 19 USC § 1609.

/s/ [illegible]

Property Management Officer
Federal Bureau of Investigation

1/27/89
Date

Attachment # 2

[Logo] UNITED STATES MARSHALS SERVICE
NORTHERN DISTRICT OF OHIO
SEIZED PROPERTY AND EVIDENCE CONTROL

---

Received From (Name and address): William A. Lehr, 1240 E 9th st., Clev., Ohio 44199

Case No.: 3170-80-F-6

Case Title: USA vrs. Larry Dean Dusenberry

Subject (Name, address): Larry Dean Dusenberry, 396 Porter Rd.

Item No.: 1

Qty.: 1

Description of Articles: $21,939.00 in U.S. Currency

Storage Location: Deposited into 15x6874.

I certify that I have received and hold myself accountable for the articles listed above:

Name & Title: Jerry Sidloski, Supv. Accy.

Agency: USMS

Date: 12/13/88

Signature: Jerry Sidloski

CHAIN OF CUSTODY

Item No.: 1

Date: 12-13-88

Relinquished By: Name & Agency: William A. Lehr, FBI

Signature: William A Lehr

Received By: Name & Agency: Jerry Sidloski, USMS

Signature: Jerry Sidloski

Purpose: Transfer custody. Deposited into 15x6874.



Attachment #3

UNITED STATES MARSHALS SERVICE

---

No. E009613

Form USM-303
(Rev. 7/20/78)

PRIOR EDITIONS
MAY BE USED

RECEIPT

UNITES STATES MARSHAL
NORTHERN DISTRICT OF OHIO

1. Received of: Willaim Lehr, FBI, Cleveland, Ohio

2. Date: December 13, 1988

3. Court/Case Number or purpose of collection: Seized Money Under FBI Case Number 3170-89-F-006

Deposited into 15x6874

4. Amount: $21,939.00

5. Total: $21,939.00

6. Received by (U.S. Marshals Service Official): Jerry Sidloski.

Attachment #4

NOVEMBER 7, 1988
CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
396 PORTER ROAD
ATWATER, OH 44201 RE: 3170-89-F-0006

DEAR MR DUSENBERRY:

On APRIL 23, 1986, property was seized by the Federal Bureau of Investigation (FBI) at ATWATER, OHIO for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was appraised at $21,939 and is described as follows:

$21,939.00 IN U.S. CURRENCY

This forfeiture is being conducted pursuant to Title 21, United States Code (U.S.C.), Section 881 and the following additional federal laws and regulations: 19 U.S.C., Sections 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81.

You may contest the seizure and forfeiture of this property and/or petition to the FBI and request a pardon of the forfeited property.

To Contest the Forfeiture

---

If you want to contest the seizure or forfeiture of the property in court, you must file a claim of ownership and a bond in the amount of $2,193 with the FBI by DECEMBER 19, 1988. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety.

If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called



"Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

---

If you want to request a pardon of the forfeited property, submit a petition for remission or mitigation of the forfeiture (an original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Sections 9.1-9.7, dated August 7, 1987 as amended in 52 Federal Register 32785, dated August, 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections 9.5(b)(l),(2),(3),(4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailed notice of seizure.

Where to Submit Correspondence

---

The seizure number 3170-89-F-0006 has been assigned to this forfeiture action. Use this number to identify the property when submitting the claim, petition or other correspondence to the FBI.

Submit all documents to this FBI Fieid Division:

CLEVELAND DIVISION
1240 EAST 9TH STREET
FED OFFICE BLDG RM. 3005
CLEVELAND, OH 44199
ATTENTION: FORFEITURE ANALYST
216-522-1400

Sincerely Yours,

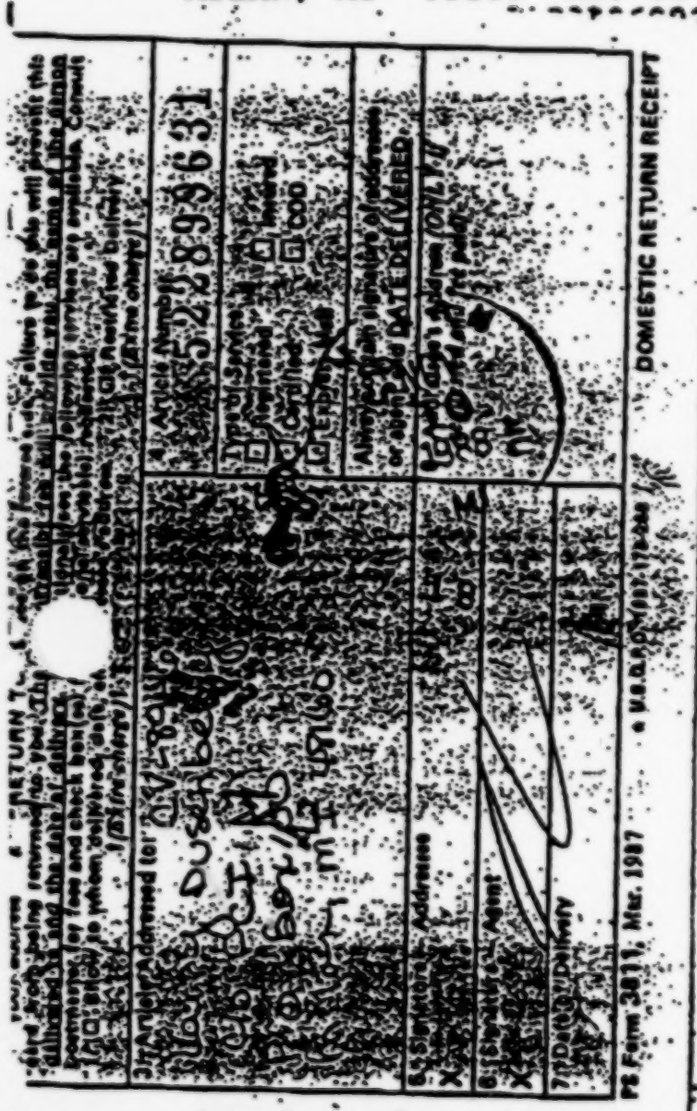
Paul V. King, Jr.
Unit Chief
Forfeiture and Seized Property Unit
Administrative Services Division

ERIC AUGSBERGER; ATAD, NARCOTICS
1.2A-638
SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
C/O FCI
PO BOX 100
MILAN, MI 48160 RE: 3170-89-F-0006




6, property was seized by the Federal
FBI) at ATWATER, OHIO for forfeiture
ROLLED SUBSTANCES ACT. The property
and is described as follows:

.S. CURRENCY

is being conducted pursuant to Title
J.S.C.), Section 881 and the following
nd regulations: 19 U.S.C., Sections
Code of Federal Regulations (C.F.R.),
31.

the seizure and forfeiture of this
to the FBI and request a pardon of the

t the Forfeiture

contest the seizure or forfeiture of
ou must file a claim of ownership and a
,193 with the FBI by DECEMBER 19, 1988.
or a cashier's check payable to the
ce or provide a surety.

gent (needy and poor), you may not
To request a waiver of the bond, you
finances in a signed statement called
"Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

1 - CLEVELAND (Attn: Forfeiture Analyst)
1 - Mr. King
PVK:CXB (4)

21

BEST AVAILABLE COPY

ERIC AUGSBERGER; ETAL; NARCOTICS
12A-638
SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
1484 STATE ROUTE 44
RANDOLPH, OH 44265 RE: 3170-89-F-0006

DEAR MR DUSENBERRY:

986, property was seized by the Federal
(FBI) at ATWATER, OHIO for forfeiture
NTROLLED SUBSTANCES ACT. The property
and is described as follows:

U.S. CURRENCY

is being conducted pursuant to Title
U.S.C.), Section 881 and the following
and regulations: 19 U.S.C., Sections
Code of Federal Regulations (C.F.R.),
81.

the seizure and forfeiture of this
to the FBI and request a pardon of the

t the Forfeiture

contest the seizure or forfeiture of
ou must file a claim of ownership and a
,193 with the FBI by DECEMBER 19, 1988.
or a cashier's check payable to the
ce or provide a surety.

gent (needy and poor), you may not
To request a waiver of the bond, you
finances in a signed statement called
of Request to Proceed in Forma
in this form from the FBI Field Office
signed declaration and a claim of
ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

If you want to request a pardon of the forfeited property, submit a petition for remission or mitigation of the

1 - CLEVELAND (Attn: Forfeiture Analyst)
1 - Mr. King
PVK:CXB (4)



MAY 4 '95 15:30

ERIC AUGSBERGER; ETAL; NARCOTICS
12A-638
SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

-89-F-0006

property was seized by the Federal
) at ATWATER, OHIO for forfeiture
LED SUBSTANCES ACT. The property
is described as follows:

CURRENCY

being conducted pursuant to Title
C.), Section 881 and the following
regulations: 19 U.S.C., Sections
of Federal Regulations (C.F.R.),

seizure and forfeiture of this
the FBI and request a pardon of the

Forfeiture

st the seizure or forfeiture of
st file a claim of ownership and a
with the FBI by DECEMBER 19, 1988.
cashier's check payable to the
provide a surety.

(needy and poor), you may not
quest a waiver of the bond, you
nces in a signed statement called
quest to Proceed in Forma
is form from the FBI Field Office
d declaration and a claim of
h the FBI by DECEMBER 19, 1988.

rdon of the Property

st a pardon of the forfeited
or remission or mitigation of the

ure Analyst)

LARRY DUSENBERRY
396 PORTER RD.
ATWATER, OHIO 44201

23

MAY 4 '95 15:31

Attachment #8

ADVERTISING ORDER

Order No. 3170-89-006

Department or Establishment, Bureau or Office: Federal Bureau of Investigation

Date: 11/7/88

Name of the Publication Advertised in: Plain Dealer

Subject of Advertisement: U.S. Currency

Edition of Paper Advertisement Appeared: Sunday

Number of Times Advertisement Appeared: Three (3)

Dates Advertisement Appeared: 11/20, 11/27, 12/4

Specifications for Advertisement: To be published once a week on Sunday for three consecutive weeks. If your newspaper DOES NOT publish on Sunday, please publish on next available date. NOTICE OF PUBLICATION SHOULD BE SUBMITTED PROMPTLY FOLLOWING THE LAST DATE THE ADVERTISEMENT APPEARS.

Copy For Advertisement: See Attached

Authority to advertise: Number 21 CFR 1316.75

Date: 11/7/88

Signature of Authorizing Official: Paul V. King, Jr.

INSTRUCTIONS TO PUBLISHERS

Extreme care should be exercised to insure that the specifications for advertising to be set other than solid be definite, clear, and specific since no allowance will be made for paragraphing or for display or leaded or prominent headings, unless specifically ordered, or for additional space required by the use of type other than that specified. Specifications for advertising other than solid and the advertisement copy submitted to the publisher will be attached to the voucher. The following is a sample of solid

line advertisement set up in accordance with the usual Government requirements.

[Sample Illegible]

Your bill for this advertising order should be submitted on the "Public Voucher for Advertising" form, which is printed on the reverse of this form, immediately after the last publication of the advertisement. If copies of the printed advertisement are not available, complete the affidavit provided on the voucher. Submit the voucher and a copy of the printed advertisement to—

FBI, 10TH AND PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20535
ATTENTION: FSPU, ROOM 6853

IMPORTANT

Charges for advertising when a ILLEGIBLE

NOV 10 1988

FBI

LEHR



On APRIL 23, 1986, at 396 PORTER ROAD, ATWATER, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $21,939.00 IN U.S. CURRENCY from LARRY DUSENBERRY, for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was appraised at $21,939. This forfeiture is being conducted pursuant to Title 21, United States Code (U.S.C.), Section 881 and the following additional federal laws and regulations: 19 U.S.C., Sections 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81. You may contest the seizure and forfeiture of this property and/or petition to the FBI and request a pardon of the forfeited property. If you want to contest the seizure or forfeiture of the property in court, you must file a claim of ownership and a bond in the amount of $2,193 with the FBI by DECEMBER 19, 1983. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988. If you want to request a pardon of the forfeited property, submit a petition for remission or mitigation of the forfeiture (an original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Sections 9.1-9.7, dated August 7, 1987 as amended in 52 Federal Register 32785, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections 9.5(b)(l),(2),(3),(4), and (5). The criteria

for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailed notice of seizure. The seizure number 3170-89-F-0006 has been assigned to this forfeiture action. Use this number to identify the property when submitting the claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst.



Attachment 9

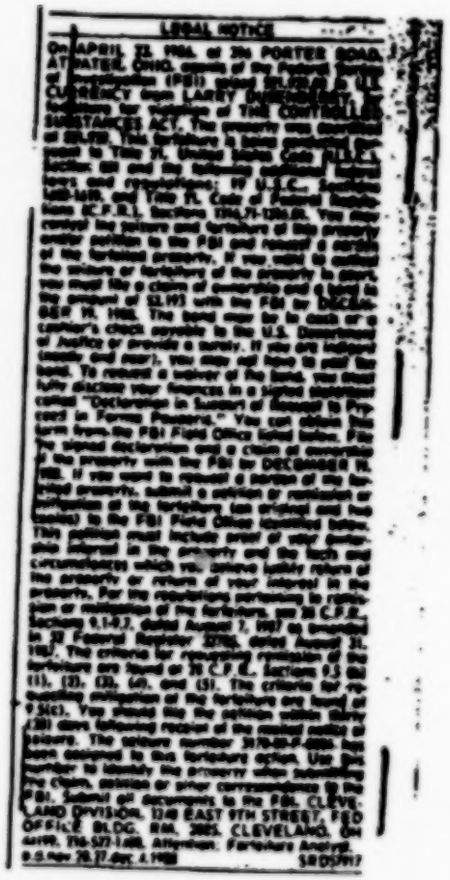
(Indicate page, name of newspaper, city and state.)
9-E, Plain Dealer, Clevela
Ohio

Date: 11-20-88
Edition: Sunday

Title: legal notice

Character:
or
Classification:
Submitting Office: Cleveland

Indexing:


LEGAL NOTICE

On APRIL 22, 1988, at 3th PORTER ROAD, AT BATES, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $15,750.00 in U.S. CURRENCY from LARRY [illegible], pursuant to provisions of Title 21, CONTROLLED SUBSTANCES ACT. The property was [illegible] on $15,750. This forfeiture is being processed pursuant to Title 21, United States Code, [illegible] Section 881 and the following additional Federal laws and regulations: 18 U.S.C. Sections [illegible], and Title 28, Code of Federal Regulations (C.F.R.), Sections [illegible]. This notice [illegible] the seizure and forfeiture of this property and/or petition to the FBI and request a return of the forfeited property. If you object to [illegible] the seizure or forfeiture of the property to court, you must file a claim of ownership and a bond in the amount of $3,937 with the FBI by DECEMBER 26, 1988. The bond must be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (unable and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a sworn statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain [illegible] form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 26, 1988. If you want to request a portion of the forfeited property, submit a petition or explanation of the hardship you would suffer if [illegible] forfeited and sold) to the FBI Field Office identified below. The petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to right-to-petition or mitigation of the forfeiture, see 28 C.F.R. Sections 9.1-9.7, dated August 1, 1987 as amended in 52 Federal Register 33760, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R. Sections 9.3 (i), (j), (3), (4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailed notice of seizure. The seizure number [illegible] has been assigned to this forfeiture action. Use this number to identify the property when submitting any claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG. RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst. [illegible] 5805917

Attachment 10

On APRIL 22, 1988, at 304 PORTER ROAD, AKRON, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $16,000 in U.S. CURRENCY from LARRY [illegible], for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was recovered at $16,000. This forfeiture is being processed pursuant to Title 21, United States Code (U.S.C.), Section 881 and the customary procedures set forth in Title 18, United States Code (U.S.C.), Section 983 and the customary procedures set forth in Title 28, Code of Federal Regulations (C.F.R.), Sections 9.1-9.8. You may contest the seizure and forfeiture of this property under petition to the FBI and request a petition of the forfeited property. If you wish to contest the seizure or forfeiture of this property in court, you must file a claim of ownership and a bond in the amount of $5,000 with the FBI by DECEMBER 19, 1988. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988. If you want to request a portion of the forfeited property, submit a petition or remission or mitigation of the forfeiture (pro original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Section 9.1-9.7, dated August 3, 1987 as amended in 52 Federal Register 33449, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections (1), (2), (3), (4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailing notice of seizure. The seizure number 3170-88-0008 has been assigned to this forfeiture action. Use this number to identify the property when submitting any claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG, RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst.

SRO5917

(Indicate page, name of newspaper, city and state.)
PG. PLAIN DEALER
CLEVELAND, OHIO

Date: 11/28/88
Edition: SUNDAY

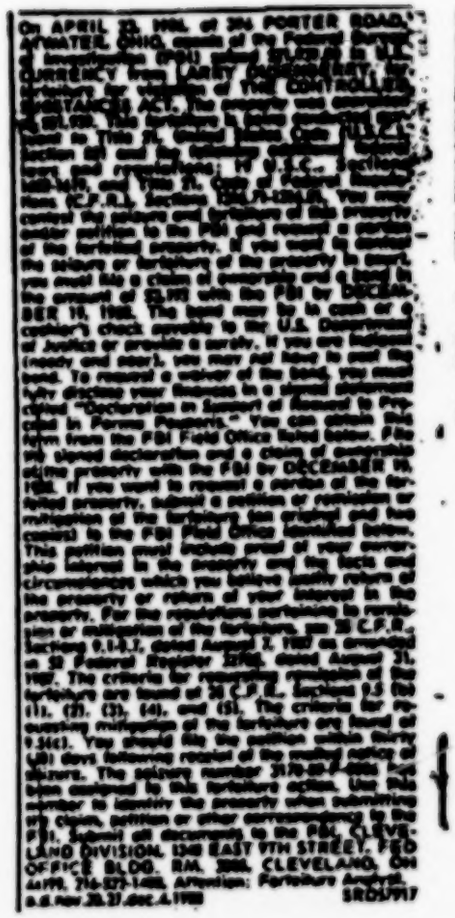
Title: LEGAL NOTICES

Character:
or
Classification:
Submitting Office:
CLEVELAND

Indexing:



Attachment 11



On APRIL 22, 1988, at 304 PORTER ROAD, AKRON, OHIO, agents of the Federal Bureau of Investigation (FBI) seized $16,000 in U.S. CURRENCY from LARRY [illegible], for forfeiture for violation of THE CONTROLLED SUBSTANCES ACT. The property was recovered at $16,000. This forfeiture is being processed pursuant to Title 21, United States Code (U.S.C.), Section 881 and the customary procedures set forth in Title 18, United States Code (U.S.C.), Section 983 and the customary procedures set forth in Title 28, Code of Federal Regulations (C.F.R.), Sections 9.1-9.8. You may contest the seizure and forfeiture of this property under petition to the FBI and request a petition of the forfeited property. If you wish to contest the seizure or forfeiture of this property in court, you must file a claim of ownership and a bond in the amount of $5,000 with the FBI by DECEMBER 19, 1988. The bond may be in cash or a cashier's check payable to the U.S. Department of Justice or provide a surety. If you are indigent (needy and poor), you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called "Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988. If you want to request a portion of the forfeited property, submit a petition or remission or mitigation of the forfeiture (pro original and two copies) to the FBI Field Office identified below. This petition must include proof of your ownership interest in the property and the facts and circumstances which you believe justify return of the property or return of your interest in the property. For the regulations pertaining to remission or mitigation of the forfeiture, see 28 C.F.R., Section 9.1-9.7, dated August 3, 1987 as amended in 52 Federal Register 33449, dated August 31, 1987. The criteria for requesting remission of the forfeiture are found at 28 C.F.R., Sections (1), (2), (3), (4), and (5). The criteria for requesting mitigation of the forfeiture are found at 9.5(c). You should file the petition within thirty (30) days following receipt of the mailing notice of seizure. The seizure number 3170-88-0008 has been assigned to this forfeiture action. Use this number to identify the property when submitting any claim, petition or other correspondence to the FBI. Submit all documents to the FBI, CLEVELAND DIVISION, 1240 EAST 9TH STREET, FED OFFICE BLDG, RM. 3005, CLEVELAND, OH 44199, 216-522-1400, Attention: Forfeiture Analyst.

SRO5917

(Indicate page, name of newspaper, city and state.)
10-E, Plain Dealer, Cleveland Ohio

Date: 12-4-88
Edition: Sunday

Title: legal notice

Character:
or
Classification:
Submitting Office: Cleveland

Indexing:

[Filed Sep. 25, 1996]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

No. 95-4188

---

LARRY DEAN DUSENBERY,
*Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA,
*Defendant-Appellee*.

---

ORDER

---

Before: GUY, RYAN, and MOORE, Circuit Judges.

Larry Dean Dusenbery appeals a district court order denying his motion for return of property filed pursuant to Fed. R. Crim. P. 41(e). The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1993, Dusenbery filed his Rule 41(e) motion, requesting the return of property seized by the Federal Bureau of Investigation (FBI) in April 1986. The district court determined that it lacked jurisdiction to entertain Dusenbery's motion because a Rule 41(e) motion was not the proper remedy for seeking return of his property. Consequently, the court denied the motion. Dusenbery has filed a timely appeal.

Upon review, we determine that the district court improperly concluded that it lacked jurisdiction to consider Dusenbery's Rule 41(e) motion. This court reviews a district court's determination that it lacked jurisdiction to consider a Rule 41(e) motion for an abuse of discretion. *See Frazee v. Internal Revenue Serv.*, 947 F.2.d 448, 449 (10th Cir. 1991).



The district court abused its discretion in denying Dusenbery's motion for lack of jurisdiction. In his Rule 41(e) motion, Dusenbery alleged that the defendant forfeited his property without giving him adequate notice of the forfeiture. While the district court concluded that it lacked jurisdiction because Dusenbery had not followed the procedures for seeking judicial relief set forth in the forfeiture statute and regulations, Dusenbery argues that he was unable to comply with these procedures because he never received notice of the forfeiture of his property.

Since Dusenbery was raising a due process challenge to the forfeiture, the district court had jurisdiction to consider his claims. While most judicial challenges to a forfeiture are foreclosed by the plaintiff's failure to use the mechanism provided in the forfeiture statue and regulations, the federal courts have jurisdiction to entertain collateral due process attacks on administrative forfeitures, including challenges to the adequacy of notice. *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (per curiam); *Toure v. United States*, 24 F.3d 444, 445-46 (2d Cir. 1994) (per curiam); *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). Although Dusenbery cannot pursue his claim in a Rule 41(e) motion because criminal proceedings against him have been completed, the district court should have construed his motion as a civil complaint seeking equitable relief. *Thompson v. Covington*, 47 F.3d 974, 975 (8th Cir. 1995) (per curiam); *Giraldo*, 45 F.3d at 511; *Toure*, 24 F.3d at 445.

Additionally, in order to assist the district court upon remand, we make several comments concerning the current state of the record. The record reveals that, in April 1986, the FBI conducted a search of Dusenbery's trailer in Atwater, Ohio and seized $21,940, a 1984 Chevrolet Monte Carlo, and a large number of Dusenbery's personal items. The government acknowledges that it subsequently forfeited this

property as proceeds of drug trafficking. Although Dusenbery argues that he was not aware of these forfeiture proceedings, the government submits that it provided Dusenbery with adequate notice of the forfeiture of his property.

Before the government forfeits property, due process requires that the government provide notice which is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Giraldo,* 45 F.3d at 511. Further, if the government is incarcerating a property owner when it elects to pursue a forfeiture action against his property, fundamental fairness requires that the defendant receive actual notice of the agency's attempt to forfeit. *Id.*; *Woodall,* 12 F.3d at 794-45. The government cannot assert that it was unaware of a property owner's location when he is incarcerated in a federal facility. *See Torres v. $36,256.80 U.S. Currency,* 25 F.3d 1154, 1160-61 (2d Cir. 1994).

The evidence presently in the record does not appear to support the government's contention that Dusenbery had actual notice of his currency's forfeiture. The government provided evidence that, in November 1988, it sent notice of the forfeiture to three separate locations. One notice was mailed to Dusenbery's home in Atwater, Ohio; however, this certified mail was returned unclaimed. A second notice was mailed to Dusenbery at a residence in Randolph, Ohio; while this certified mail was signed for by an Edward Clouse, no evidence exists in the record concerning Clouse's relationship with Dusenbery or if Clouse ultimately provided this notice to Dusenbery. The third notice was sent to Dusenbery at the Federal Correctional Institution (FCI) in Milan, Michigan. While it is undisputed that Dusenbery was incarcerated at FCI Milan during this time, he notes that the certified mail gives an inaccurate P.O. Box for the facility. Further, the certified mail receipt contains an illegible signature. The government has not provided any additional evidence attempting to show



who signed for the letter or the standard procedure for processing such a letter once it arrived at the facility. Therefore, from the evidence in the record, it is not clear that: 1) the certified mail arrived at Milan, 2) a prison employee signed for it, or 3) the notice was ultimately forwarded to Dusenbery through the prison mail system. Lastly, the government did publish notice of the forfeiture in the *Cleveland Plain Dealer* on three separate occasions. However, as the government knew or should have known that Dusenbery was incarcerated at FCI Milan, it is not clear that publication in an Ohio newspaper was sufficient to provide Dusenbery with notice.

The evidence supporting the notice provided by the government for the forfeiture of Dusenbery's Monte Carlo appears even more attenuated. First, the government mailed notices to Dusenbery in Randolph, Ohio and Atwater, Ohio, although the record does not reflect that anyone received and signed for this certified mail. Second, the government mailed notice to Alma Dusenbery, but the record does not reflect her relationship to Dusenbery nor does it show that she actually received this notice. Third, the government sent notice to Dusenbery at the Portage County Jail in January 1987, but the record again does not contain any signature on certified mail demonstrating receipt of this notice. Further, Dusenbery submits that he was not located at the Portage County Jail during this time but was rather incarcerated at the FCI in Ashland, Kentucky. Lastly, the government again published notice of the forfeiture on three separate occasions in the *Cleveland Plain Dealer*, which appears insufficient to provide notice for a prisoner incarcerated in another state.

We also note that the government has not provided any evidence that it gave Dusenbery notice of the forfeiture of his personal property. Consequently, we remand this case to the district court so it can construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the

various forfeitures.

Accordingly, this court vacates the district court's judgment and remands this case for further proceedings. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ [Illegible]
Clerk



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

---

IN THE MATTER OF THE PROPERTY FORFEITURE
OF LARRY DEAN DUSENBERY

State of Michigan )
County of Wastenaw )

DECLARATION OF JAMES LAWSON

COMES NOW, James Lawson, and declares

1. I am currently employed by the United States Government as an Inmate Systems Officer, assigned in the Mail Room at the Federal Correctional Institution, Milan, Michigan (F.C.I. Milan).

2. I received a copy of a certified mail receipt from the Legal Department at FCI Milan, and they received the copy from the United States Attorney's Office for the Northern District of Ohio. (See Exhibit "A").

3. I reviewed the certified mail receipt and can attest that the signature/initials on the form are my signature/initials.

4. The reason my signature appears on the form is based upon the procedure/practice used at FCI Milan for distribution of mail, specifically certified mail that has been forwarded to inmates housed at FCI Milan.

5. Specifically, FCI Milan Mail Room staff travel to the Post Office located in the City of Milan, Michigan everyday to obtain all mail for the institution, including inmate mail.

6. All certified mail requiring signature is signed for by the FCI Mail Room staff prior to departing the Post Office. This is why my signature appears on the receipt and not Mr. Dusenberry's signature.

7. Once the mail is transported to FCI Milan, all certified mail is entered into a log book maintained in the mailroom. Staff are then required to sign the log book acknowledging receipt of the certified piece of mail prior to removal from the Mail Room.

8. In the case of inmate mail, a member of the inmate's Unit Team will sign for the inmate's certified mail in the log book.

9. The Unit Team member or a correctional staff member will then distribute the mail to the inmates during the institution' s mail call.

10. Unfortunately, due to the fact that this event occurred in 1988, a inspection of old institutional log books indicates that log book no longer exists, and was most likely destroyed per BOP policy due to its age.

11. It should be noted that based upon the attached certified receipt, the letter was delivered to FCI Milan, and pursuant to the business practices of FCI Milan it should have been received by the inmate.

END OF STATEMENT

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing statements are true and correct.

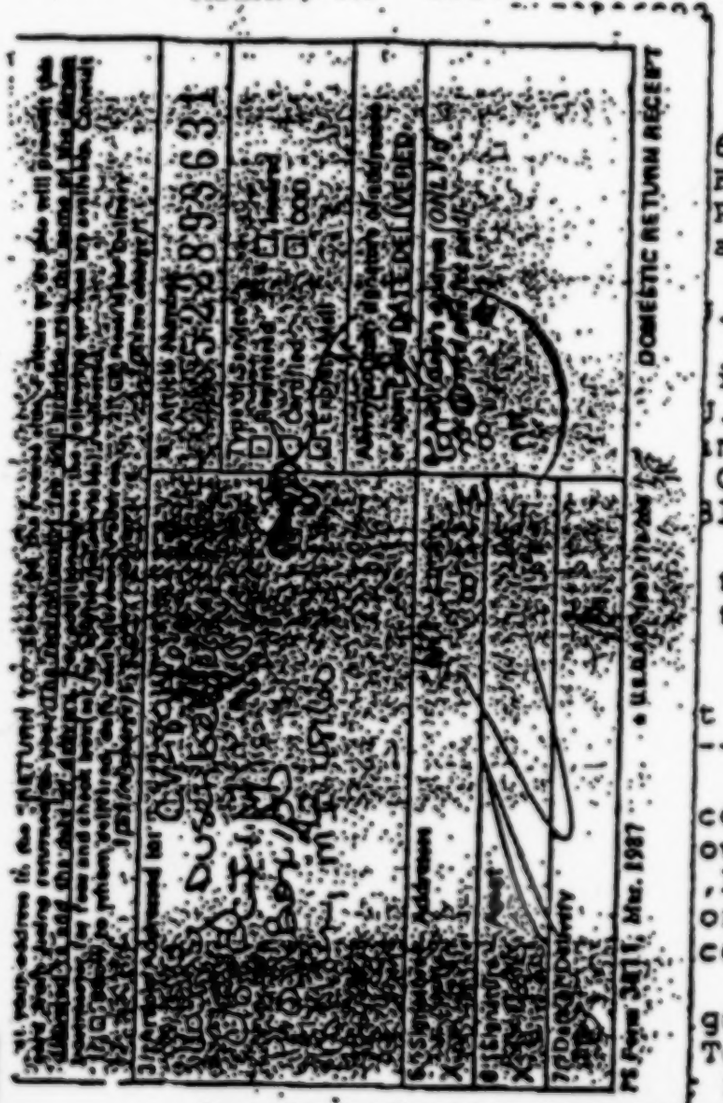
11-04-1996 /s/ James Lawson
Date Inmate Systems Officer
Federal Correctional Institution, Milan MI

SEIZURE NUMBER: 3170-89-F-0006

NOVEMBER 7, 1988

CERTIFIED RETURN RECEIPT

MR LARRY DUSENBERRY
C/O FCI
PO BOX 100
MILAN, MI 48160 RE: 3170-89-F-0006



6, property was seized by the Federal
FBI) at ATWATER, OHIO for forfeiture
ROLLED SUBSTANCES ACT. The property
and is described as follows:

.S. CURRENCY

is being conducted pursuant to Title
.S.C.), Section 881 and the following
nd regulations: 19 U.S.C., Sections
Code of Federal Regulations (C.F.R.),
81.

the seizure and forfeiture of this
to the FBI and request a pardon of the

t the Forfeiture

contest the seizure or forfeiture of
ou must file a claim of ownership and a
,193 with the FBI by DECEMBER 19, 1988.
or a cashier's check payable to the
ce or provide a surety.

gent (needy and poor), you may not
To request a waiver of the bond, you
finances in a signed statement called
"Declaration in Support of Request to Proceed in Forma Pauperis." You can obtain this form from the FBI Field Office listed below. File the signed declaration and a claim of ownership of the property with the FBI by DECEMBER 19, 1988.

To Request a Pardon of the Property

1 - CLEVELAND (Attn: Forfeiture Analyst)
1 - Mr. King
PVK:CXB (4)

00141

50908-060

PAGE.002

MAY 4 '95 13:29

EXHIBIT A 38

BEST AVAILABLE COPY

[Filed Feb. 28, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

---

CASE NO. 5:95CV1872
(Criminal Case No. 5:86CR102)
Judge David D. Dowd, Jr.

---

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

LARRY DEAN DUSENBERY,
*Defendant.*

---

PLAINTIFF' S RESPONSE
TO DEFENDANT'S
REQUESTS FOR ADMISSION

NOW COMES Plaintiff, the United States of America, and files this response to Defendant's Requests for Admission:

1) Do you admit that the forfeiture notification for the $21,940 was sent to P.O. Box 100 which is an incorrect address for the Federal Correctional Institution in Milan, Michigan 48160?

Answer: YES

2) Do you admit that the certified mail receipt for the forfeiture notification pertaining to the $21,940 contains an illegible signature?

Answer: NO

3) Do you admit that all certified mail that arrives at the Federal Correctional Institution in Milan, Michigan must be signed into a log book acknowledging receipt of the certified piece of mail?

Answer: YES.

4) If the answer to admission #3 is true, do you admit that you cannot produce this log book?

Answer: YES.

5) Do you admit that you cannot establish that the certified forfeiture notification pertaining to the $21,940, if it did arrive at FCI Milan, was ultimately forwarded to Larry Dusenbery through the prison mail system?

Answer: YES.

6) Do you admit that the 1984 Chevrolet Monte Carlo seized by the Federal Bureau of Investigation (FBI) was seized because the FBI claimed the car belonged to Larry Dusenbery?

Answer: NO.

7) Do you admit that Larry Dusenbery was incarcerated at the Federal Correctional Institution at Ashland, Kentucky in 1987?

Answer: YES.

8) Do you admit that the government sent forfeiture notification pertaining to the 1984 Chevrolet Monte Carlo to the Portage County Jail in 1987?

Answer: YES.

9) Do you admit that Larry Dusenbery was not at the Portage County Jail in 1987 because he was incarcerated at the Federal Correctional Institution at Ashland, Kentucky?

Answer: YES.



10) Do you admit that the government did not send Larry Dusenbery any forfeiture notifications pertaining to his personal property listed in his 41 (e) motion?

Answer: YES.

STATE OF OHIO )
) ss:
COUNTY OF CUYAHOGA )

VERIFICATION

The responses to numbers 1, 2, 6, 7, 8, 9 and 10 of Defendant's Requests for Admission are true and accurate to the best of my information, knowledge and belief.

/s/ Steven W. Pyles
Steven W. Pyles
Paralegal Specialist
Federal Bureau of Investigation

Sworn to and subscribed in my presence this 12th day of February, 1997.

/s/ Theresa M. Bozak
Notary Public

THERESA M. BOZAK
Notary Public, State of Ohio
Recorded in Cuyahoga, Cty.
My Comm. Expires 8/17/98

STATE OF MICHIGAN )
) ss:
COUNTY OF WASTENAW )

VERIFICATION

The responses to numbers 3, 4, and 5 of Defendant's Requests for Admission are true and accurate to the best of my information, knowledge and belief.

/s/ Kevin Walasinski
Kevin Walasinski
Attorney-Advisor
Federal Correctional Institution,
Milan, Michigan

Sworn to and subscribed in my presence this 19th day of February, 1997.

/s/ Velda M. Bell
Notary Public
NOTARY PUBLIC
WASHTENAW CO., MICH
My Commission expires
[ILLEGIBLE]

CERTIFICATION

Pursuant to Rule 26(g)(2), Federal Rules of Civil Procedure, undersigned counsel hereby certifies the foregoing responses and objections.

/s/ Herbert J. Villa
Herbert J. Villa
Assistant U.S. Attorney



[CERTIFICATE OF SERVICE]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

---

Case No. 95-CV-1872
Crim. No. 5:86 CR 102
Honorable David D. Dowd, Jr.

---

UNITED STATES OF AMERICA,
*Plaintiff,*

-vs-

LARRY DEAN DUSENBERY
*Defendant.*

---

AFFIDAVIT OF
LARRY DEAN DUSENBERY

STATE OF INDIANA) ss,
COUNTY OF VIGO )

Larry Dean Dusenbery, being first duly sworn, deposes and states as follows:

1) I am the Defendant in Civil No. 95 CV 1872 and Crim. No. 5:86 CR 102.

2) On April 23, 1986 the Federal Bureau of Investigation (FBI) searched my residence in Atwater, Ohio and seized $21,940, a 1984 Chevrolet Monte Carlo, and a large number of my personal items.

3) I was the true owner of the $21,940, the personal property, and the 1984 Monte Carlo.

4) I bought the Monte Carlo from Mike Groff and placed the title in my stepmother's name, Alma Dusenbery.



5) I did not receive any forfeiture notifications for any of the items seized.

6) I was not advised by anyone that forfeiture proceedings were being initiated against any of the items seized.

7) I was incarcerated at the Federal Correctional Institution (FCI) in Ashland, Kentucky from September, 1986 until April, 1988 when I was moved to FCI Milan, Michigan.

8) That because I was incarcerated out of the State of Ohio I did not see any newspaper publications pertaining to the forfeiture of my property in the Ohio newspapers.

9) That the mailing address for FCI Milan, Michigan is Post Office Box 1000 and not Post Office Box 100.

FURTHER DEPONENT SAYETH NOT.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge, information and belief, pursuant to 28 U.S.C. section 1746.

Dated: Feb. 14, 1997.

/s/ Larry Dean Dusenbery
Larry Dean Dusenbery

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

---

Case No. 5:95CV1872
86CR0102
Akron, Ohio

---

LARRY DEAN DUSENBERY,
*Plaintiff,*

vs.

UNITED STATES OF AMERICA,
*Defendant.*

---

Telephone Deposition of
JAMES CURTIS LAWSON
Wednesday, July 23, 1997, 10:30 a.m.
Before the Honorable David D. Dowd, Judge

APPEARANCES:

For the Plaintiff: Larry Dean Dusenberry

For the Defendant: Herbert J. Villa
James L. Morford
Assistant United States Attorneys
1880 Bank One Center
600 Superior Avenue, East
Cleveland, Ohio 44114

Court Reporter: Caroline Mahnke
Federal Building & U.S. Courthouse
125 Market Street
Youngstown, Ohio 44503

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.



THE COURT: We are calling you today for the purpose of taking a deposition in the case of Dusenberry versus United States, 5:95CV1872.

The deposition is to be of James Lawson. Is he present?

VOICE: Yes, sir, and he is present. Let me put you on speaker phone. Do I have you, your Honor?

THE COURT: Yes.

Let me go on further with the record. Mr. Lawson?

MR. LAWSON: Yes.

THE COURT: This is Judge Dowd and I am going to preside over your deposition to be taken by Larry Dean Dusenberry, and I would ask now that you take the oath.

JAMES CURTIS LAWSON,

a witness called by the Plaintiff, being first duly sworn, was examined and testified as follows:

THE COURT: Very well. Now, present in the room is, of course, Mr. Dusenberry, a court reporter, Mr. Villa, Mr. Morford, my law clerk, several people from the marshal's office and of course Mr. Dusenberry.

Mr. Dusenberry, you made proceed now with your questions.

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERPY:

Q. For the record, please state your full name and spell your last name.

A. James Curtis Lawson, last name spelling L-A-W-S-O-N.

Q. And what is your occupation?

A. I am employed at FCI Milan. My position is an Inmate Systems Officer.

Q. How long have you been employed in that capacity?
A. Approximately ten years.
Q. When did you begin to work in the mail room at FCI Milan?
A. I believe that was in early '88.
Q. You do not know the date?
A. I do not know specifically when I began working in the mail room, no, sir.
Q. Did you work in the mail room in November of 1988?
A. Yes, sir, I did.
Q. Have you consulted with any government officials such as Gregory Sasse or any other United States attorney, FBI agent, etcetera pertaining to today's deposition?
A. I've consulted with our staff attorney, Mr. Walasinski.
Q. And what did you discuss?
A. We simply covered my earlier statement, reviewed it.
Q. Did any government official prepare you for today's disposition?

THE COURT: It's deposition.

BY MR. DUSENBERRY:

Q. Deposition?
A. No, sir.
Q. Were you coached by any government official as to what you are to say in today's deposition?
A. No, sir, I was not.
Q. Have you had any disciplinary reports, remands, reprimands, etcetera, since you have been employed by the Bureau of Prisons?

MR. VILLA: Your Honor, I would object to that.

THE COURT: Objection sustained.

BY MR. DUSENBERRY:

Q. Have you ever been arrested?

MR. VILLA: Your Honor, I would object to that.



THE COURT: Sustained.

You can ask if he's ever been convicted of a felony.

BY MR. DUSENBERRY:

Q. Have you ever been convicted of a felony?
A. No, sir, I have not.
Q. Do you hold any bad feelings or prejudice against me for any reasons relating to my incarceration at FCI Milan?
A. No, sir, I do not.
Q. Have you ever been involved in any investigations pertaining to me?
A. Not to my knowledge, no.
Q. Have I ever sued you?
A. Not that I know of.
Q. Do you hold any prejudice against me for suing any of your fellow employees?
A. No, sir, I do not.
Q. Do you have any other relatives working within the Bureau of Prisons?
A. No, I do not.
Q. You have sworn out an affidavit pertaining to a certified mail receipt that relates to this case, correct?
A. Yes, I have.
Q. In your affidavit, you allege that you received a copy of the certified mail receipt from the legal department, FCI Milan, and that they received the copy from the U.S. attorney's office for the Northern District of Ohio; correct?
A. Yes, sir, that is correct.
Q. Now, this certified mail was allegedly sent November 1988, correct?
A. Yes.
Q. You claim in your affidavit that you—after you received the certified mail receipt from the legal department which was originally sent in November 1988, eight years ago, that you can identify the signature on that receipt, correct?
A. Yes, I can identify that as being my own.

Q. And you claim the signature on the receipt is yours?
A. That is correct.
Q. You are a hundred percent sure?
A. Yes, I am.
Q. Is it true that the receipt contains an illegible signature?
A. I can identify it as my own. I can't determine whether or not someone else would classify it as being illegible.
Q. Is it a signature or is it initials?
A. It is initials, sir.
Q. If an ordinary person was to look at the signature, could they identify the signature?
A. I doubt that.
Q. Is there any way possible that the signature could be someone else's?
A. Yes, there is that possibility.
Q. Has anyone requested you to say that it's your signature?
A. No, sir.
Q. Do you admit that the certified mail receipt has an incorrect post office box number and is not the post office box number for FCI Milan?
A. Sir, on the copy that I have of that receipt, I cannot determine that. It's somewhat blurred.
Q. What is the post office box that was on the certified mail receipt? What is the post office box for Milan, Michigan?
A. We have two post office boxes that we use for the institution. One is 9999, the other one is 1000.
Q. Are you aware that the certified mail receipt had P.O. Box 100 on it?
A. Sir, I'm looking at a photocopy and I really can't determine that.
Q. Is it a letter, the photocopy, is it on the front of a letter?
A. One moment. Yes, it is.



Q. What does it say at the top?
A. P.O. Box 100.
Q. Thank you.
So, you say that the signature could possibly be somebody else's; is that correct?
A. I guess there is that possibility; but looking at it, I can identify that as either being my signature or one very similar to it.
Q. Do you admit that all certified mail that arrives at FCI Milan must be signed in a log book and acknowledge receipt of the certified piece of mail?
A. That is correct.
Q. Can you produce this log book?
A. No, sir, I cannot.
Q. If you cannot produce the log book, do you admit that you cannot prove that whatever was attached to the certified mail receipt was ultimately forwarded to Larry Dusenberry through the prison mail system?
A. No, sir, I cannot prove that.
Q. In other words, after you signed for the mail and brought it to the mail room at FCI Milan, if it is your signature, you do not know what happened to the mail after that, correct?
A. Due to the fact that there is no longer a log book because we dispose of those one year after closing, there is no longer a paper trail that would allow us to trace that back, sir.
Q. My question to you is: Do you know what happened to the mail after it came to FCI Milan?
A. Procedure would be that I would log it in, sir, identifying your name, the registered number, or I should say the certification number, and it would be signed for by your unit team and then given to yourself.
Q. But because you do not have the log book, you do not know what happened to the mail; is that correct?
A. That is a correct statement, sir.

Q. Do the counselors in each inmate's housing unit also have a log book in which they have the inmate sign for the certified mail before the mail is given to the inmate, a separate log book than the log book in the mail room?

A. Sir, I do not know if that is policy because it is not something that would be pertinent to my department. That would be case workers' responsibility.

Q. Can you find that out for me?

A. Sure, I would be happy to look into that.

Q.The Bureau of Prisons does not keep these log books in an archive for later purposes such as this one?

A.No, they don't. Those are held for one year after they're closed and then they are disposed of. That is per BOP policy.

MR. DUSENBERRY: That's all I have.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. VILLA:

Q. Mr. Lawson, this is Herbert Villa, of the U.S. attorney's office.

A. Yes.

Q. I would like to get back to the issue that it's possible that the signature could be somebody else's.

If you look at that signature, of course somebody could duplicate it, perhaps, but to the best of your knowledge, to the best of your vision, is that your signature on that card?

A. Yes, sir, it is.

MR. VILLA: I don't have any further questions.

THE COURT: Anything further?

EXAMINATION OF JAMES CURTIS LAWSON

BY MR. DUSENBERRY:

Q. But you do admit that it's possible that signature could be someone else's?



A. I think that would be speculation. Anything is possible, but I can't identify that as being my signature.

Q. But you are not a hundred percent sure?

A. Well, I can state that that is identical to my signature, sir.

Q. But you're not sure—you are not a hundred percent sure if it is your signature?

A. I can honestly say that is my signature, but like I said before, you know, if you want to take it into the realm of what could be, yes, it could be a forgery.

Q. It could be somebody else's signature?

A. That is possible.

MR. VILLA: Thank you.

THE COURT: I believe that concludes the deposition. Thank you very much.

Kindly, I will direct the court reporter to transcribe the deposition and then the clerks office to mail a copy to Mr. Dusenberry, and I will accept further briefing on the convening motions for summary judgment.

I would ask that each of you file your supplemental brief no later than four weeks from now which we'll set the date as—well, let's make it August 22. Maybe it will be a little more than four weeks. And then I will consider the matter submitted. Thank you very much for everybody's cooperation, especially in Milan. Thanks.

MR. LAWSON: Thank you, your Honor.

THE COURT: This deposition here is over.

MR. LAWSON: Thank you very much. Good-bye.

THE COURT: Good-bye.

MR. VILLA: Your Honor, off the record for a minute.

(Deposition concluded 10:50a.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Caroline Mahnke 7-25-97
Caroline Mahnke, RMR Date



[Filed Jan. 19, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

---

CASE NO. 5:95-CV- 1872
5:86-CR- 102
Judge James S. Gwin

---

UNITED STATES OF AMERICA.
*Plaintiff.*

v.

LARRY DEAN DUSENBERY.
*Defendant.*

---

OPINION AND ORDER

On March 26, 1997, Defendant Larry Dean Dusenbery filed a motion for summary judgment in this forfeiture case. [Doc. 138]. On March 28, 1997, Plaintiff United States filed a motion for summary judgment. [Doc. 139]. Both parties supplemented their motions with later briefs. [Doc. 152, 154, 173, 174, and 175].

In this opinion, the Court must determine whether a genuine issue of material fact exists regarding whether the government provided proper notice to Defendant Dusenbery when forfeiting cash proceeds from drug sales. The Court finds that Plaintiff United States provided proper notice.

The Court must also determine whether Plaintiff Dusenbery has a right to compensation for personal property that was destroyed upon his conviction or for which he had improper notice of forfeiture. The Court finds that Defendant Dusenbery is not entitled to compensation for the personal property.

Accordingly, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On April 29. 1986, Defendant Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property.

After Defendant Dusenberys conviction,[1] the government, with the assent of the U.S. Attorney's Office. abandoned or destroyed Dusenbery's personal property as evidence. No official forfeiture proceeding was initiated. Dusenbery's right to compensation for this property is at issue.

The government initiated administrative forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(6) with regard to the cash and the automobile as proceeds of drug sales. Defendant Dusenbery did not file a bond to stop the administrative proceedings as required by C.F.R. § 1316.76 and the forfeiture proceeded. Dusenbery claims he did not do so because he never received notice of the forfeiture proceedings.

In 1993, Plaintiff Dusenbery filed a Rule 41(e) motion requesting the return of the seized property. United States District Judge David D. Dowd denied Dusenbery's motion for lack of jurisdiction.[2] On September 25, 1996, the United States Court of Appeals for the Sixth Circuit vacated the

[1] Dusenbery pled guilty to the drug charge and was sentenced on July 15. 1986.

[2] A complete history of the procedure of this case is set forth in District Judge Dowd's opinion of October 5, 1995 [Doc. 115].



judgment and remanded the case.[3] The Sixth Circuit directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures."[4]

Subsequent to the Sixth Circuit opinion, both parties in this case filed motions for summary judgment.

On May 29. 1997, District Court Judge Dowd ordered an evidentiary hearing to determine the value of the personal property and the validity of a prison employee's declaration that notice of the cash's forfeiture was received at the prison where Defendant Dusenbery was incarcerated. At the hearing, the Court presided over a telephone deposition of James Lawson, an Inmate Systems Officer and the Federal Correctional Institution in Milan. Michigan, where Defendant Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered.

At the hearing, District Court Judge Dowd determined that the personal property should have been returned upon Dusenbery's conviction. Because no forfeiture proceeding was initiated regarding the personal property and the property had been destroyed, Judge Dowd found that Defendant Dusenbery was entitled to the value of the personal property at the time it was seized and not returned. Judge Dowd reduced the value of the property by twenty-five percent because the property was not new at the time of the seizure.

Also at the hearing, Defendant Dusenbery admitted he purchased items of personal property and the 1984 Monte Carlo with proceeds from drugs sales. District Court Judge Dowd directed the parties to brief the issue whether Defendant Dusenbery was entitled to the value of personal property and the vehicle bought with drug money.

[3] Doc. 121.

[4] *Id.*

On September 15, 1997, before rendering a decision on the issues in this case, District Court Judge Dowd granted Defendant Dusenbery's request for recusal.[5] The case was ultimately reassigned to District Court Judge James S. Gwin, who determines the pending issues herein.

## II. STANDARD OF REVIEW

Fed. R. Civ. P. 56 (c) states the procedure for granting summary judgment and says in pertinent part:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In considering a motion for summary judgment, the court must view the facts and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *SEC v. Blavin*, 760 F.2d 706, 710 (6th Cir. 1985). The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *60 Ivy Street Corp.*, 822 F.2d at 1435.

Essentially factual disputes about matters essential to adjudication preclude the Court from granting summary judgment. *See id.* But not every factual dispute between the parties will prevent summary judgment. Rather, the disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

---

[5] Doc. 160.



The factual dispute must also be genuine. The facts must be such that if they were proven at trial a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *60 Ivy Street*, 822 F.2d at 1435 (citing *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Thus, the judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue a proper jury question, and not to judge the evidence and make findings of fact. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *60 Ivy Street*, 822 F.2d at 1436 (quoting *Anderson*, 477 U.S. at 249).

Both Plaintiff United States and Defendant Dusenbery move for summary judgment. The Court addresses the relevant issues in turn.

## III. ANALYSIS

### A. $21,939 in Cash

Defendant Dusenbery claims he never received proper notice that forfeiture proceedings regarding the seized cash had been instituted. The Court disagrees and grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion on this issue.

The government admits that the address on the notice was incorrect: instead of reading P.O. Box 1000, the notice was

addressed to P.O. Box 100 in Milan. Michigan. The certified mail receipt contained an arguably illegible signature. In its opinion directing District Court Judge Dowd to evaluate the notice in this case, the Sixth Circuit pointed out that the government had not, as of that date, produced sufficient evidence that a prison employee signed for the forfeiture notice or the standard procedure for processing such notice once it arrived at the prison.

Since the Sixth Circuit's opinion, the government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Mr. Lawson attested that he signed the certified mail receipt and described the process for forwarding prison mail to the inmates.[6] Mr. Lawson's deposition testimony is consistent with his affidavit.

Defendant Dusenbery counters Mr. Lawson's testimony one two grounds. First. Dusenbery argues that even if the Court accepts that notice arrived at the Milan facility, the government cannot show that notice was forwarded to him. Second, Dusenbery points out that Mr. Lawson admitted he could not be "100%" certain that the signature on the receipt was his; that is, there is a "possibility" that the signature was forged or was signed by the owner of P.O. Box 100 instead of P.O. Box 1000. The Court is not persuaded by Defendant Dusenbery's arguments.

First, the Sixth Circuit does not require the government to show the mail actually reached an inmate in order to satisfy requirements of due process. In *United States v. Real Property, Tree Top, et al.*, 129 F.3d 1266 (TABLE), 1997

[6] Mr. Lawson states that as a Mail Room employee at the Milan facility, he reviewed and signed the certified mail receipt. All certified mail is entered into a log book before the mail leaves the Mail Room. A staff member assigned to the inmate signs for the inmate's mail and delivers it to the inmate. Mr. Lawson states that the log hook no longer exists. According to prison policy, the log books are disposed of after one year.



WL 702771 (6th Cir. 1997), the Sixth Circuit addressed a contention of inadequate notice posed by an inmate at the Milan facility. The Sixth Circuit found that proof of certified mail sent to an inmate's place of residence satisfied the inmates due process rights. *Id.* at *2.

The government in this case has provided persuasive evidence that a prison mail room employee. Mr. Lawson, signed the certified mail receipt. This notice was reasonably calculated to notify Defendant Dusenbery of the forfeiture action. Under *Tree Top*, it is not the government's burden to show, as Defendant Dusenbery argues, that he actually received the notice.[7]

[7] Defendant Dusenbery argues this Court cannot rely on *Tree Top*, an unpublished opinion, for its decision here. Dusenbery's correct that Sixth Circuit Rule 24(c) states citation of unpublished opinions is disfavored except for establishing res judicata. estoppel. or the law of the case.

However, the rule also states:

> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

The government included a copy of *Tree Top* in its supplemental pleading, Doc. 174. It is undisputed that Defendant Dusenbery received a copy of the opinion, as he references it in has supplemental pleading, Doc. 175.

The sufficiency of notice is a material issue in this case and no other published opinion of the Sixth Circuit falls as squarely on the facts of this case as *Tree Top*. The *Tree Top* opinion is also significant because it was decided after the Sixth Circuit's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point. Therefore, Defendant Dusenbery's argument that this Court should not rely on *Tree Top* is of no moment.

Dusenbery's assertion that there is a possibility of forgery is similarly unconvincing. Even viewing Dusenbery's argument in a light most favorable to him, the Court cannot recognize a mere possibility of forgery as sufficient evidence to survive a summary judgment motion.

Accordingly, the Court grants the government's motion and denies Defendant Dusenbery's motion with regard to the $21,940 in cash.

B. 1984 Monte Carlo and Miscellaneous Personal Property

Defendant Dusenbery argues that the government's notice of forfeiture regarding the Monte Carlo was insufficient to notify him of the proceeding. Dusenbery also claims violation of his due process rights when the government destroyed miscellaneous items of personal property after his conviction. Dusenbery makes no allegations of illegal seizure of the car or items of personal property. The government concedes Dusenbery has standing to bring claims about the car despite the fact that Dusenbery's stepmother is the titled owner.[8]

At the hearing to determine the value of the personal property, Defendant Dusenbery admitted that the car and personal property were purchased with drug proceeds. District Court Judge Dowd directed the parties to brief the Court about whether Dusenbery's admission disqualifies him from having his vehicle returned to him for lack of proper notice or from being compensated for the personal property's destruction without a forfeiture proceeding.

In other words, this Court is not presented with the issue of sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the destruction of his personal property.[9] Instead, this Court must

[8] Doc. 149.

[9] The Court notes that there appears to be no issue of notice to resolve. In its opinion confirming the district court's jurisdiction over the case, the Sixth Circuit directed the Court to determine the propriety of the



determine whether Defendant Dusenbery is entitled to compensation. The Court finds he is not.

The Court notes first that although Judge Dowd identified three items of personal property as being purchased with drug proceeds, Defendant Dusenbery's testimony at the hearing indicates that all items of personal property were purchased with drug proceeds:

Q: Was any of this [personal] property purchased on credit cards?
A: No, sir.
Q: Was it purchased by cash?
A: Yes.
Q: And where did the cash come from?
A: It came from me.
Q: Were you employed?
A: No.
Q: Where did the cash come from then?
A: From selling drugs.

* * * *

The Court: You indicated . . . that the source of the money for at least one of the purchases is drug money. Is it your position that all these items were bought with drug money?

government's notice regarding forfeiture of the $21,939 in cash and the Monte Carlo. This Court has already determined that notice regarding the cash was sufficient. *See* Part III.A, *supra*.

With regard to forfeiture of the Monte Carlo, the Sixth Circuit noted the attenuated nature of the evidence of notice. *See* Doc. 121, at 4. Since the Sixth Circuit's opinion, this Court can find no record of the government's offering evidence to support the legitimacy of notice of forfeiture of the Monte Carlo. Further, the evidentiary hearing transcript indicates Dusenbery was entitled to compensation, prior to his admission that the car and personal property were purchased with drug proceeds. Therefore, this Court addresses only the effect of Dusenbery's admission on his right to compensation.

Mr. Dusenbery: Yes, your honor.

Evidentiary Hearing Transcript, Doc. 147, at 11-12, 15.

With regard to the Monte Carlo, the Court found it was purchased with drug proceeds:

The Court: How did you acquire that automobile?

Mr. Dusenbery: That automobile was purchased from Michael Groff in 1985. I paid him in cash.

The Court: How much did you pay for it?

Mr. Dusenbery: I paid $8,000 for the car.

The Court: What was the source of the cash?

Mr. Dusenbery: I believe I paid some of the money and—no I believe I paid it all. And it was probably proceeds.

The Court: From drug proceeds?

Mr. Dusenbery: From cocaine sales.

The Court: All right. Well, well take that . . . the defendant concedes it was purchased by drug proceeds.

Evidentiary Hearing Transcript. Doc. 147, at 22.

Defendant Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983—two years before any of the items or the car at issue was purchased—lead this Court to find that all items of personal property and the car were purchased with drug proceeds. Therefore, the Court's disposition on the issue of compensation applies equally to all the personal property and the Monte Carlo.

Defendant Dusenbery argues he is entitled to compensation for the violation of his rights. The Court is not persuaded.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In the Sixth Circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property



secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). As another court explained, someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity." *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994). The Sixth Circuit specifically pointed to *Tilley* for support in the *Salinas* opinion.

Although proper notice was not at issue in either *Salinas* or *Tilley*, the general principle in those cases remains. Defendant Dusenbery has no property rights in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenbery to retain the fruits of illegal activities, his involvement in which is undisputed.

In short, Defendant Dusenbery concedes he purchased the property with drug proceeds. He does not challenge the legality of the seizure of this property. In light of these concessions, this Court can find no genuine issue of material fact which survives for trial.

Further, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity.

Accordingly, the Court declines to exercise its equitable powers to compensate Defendant Dusenbery regarding the Monte Carlo and the personal property.

## IV. CONCLUSION

For the reasons described herein, the Court grants Plaintiff United States' motion for summary judgment and denies Defendant Dusenbery's motion for summary judgment.

IT IS SO ORDERED.

Date: January 15, 1999 /s/ James S. Gwin
Hon. James S. Gwin
U.S. District Judge



# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

---

No. 99-3148

---

UNITED STATES OF AMERICA,
*Plaintiff-Applellee*,

v.

LARRY DEAN DUSENBERY,
*Defendant-Appellant*.

---

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 95-01872—James S. Gwin, District Judge.

---

Submitted: June 15, 2000
Decided and Filed: July 10, 2000*

---

Before: MARTIN, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

---

## COUNSEL

---

ON BRIEF: Larry Dean Dusenbery, Terre Haute, Indiana, *pro se*. Herbert J. Villa, ASSISTANT U.S. ATTORNEY, Cleveland, Ohio, for Appellee.

---

## OPINION

---

* This decision was originally issued as an "unpublished decision" filed on July 10, 2000. On August 1, 2000, the court designated the opinion as one recommended for full-text publication.

PER CURIAM. Larry Dean Dusenbery appeals a district court judgment granting summary judgment for the government in this administrative forfeiture proceeding initiated pursuant to 21 U.S.C. § 881(a)(6). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On April 29, 1986, Dusenbery was arrested on drug and possession of firearm charges. During a search of Dusenbery's property at the time of the arrest, law enforcement agents seized approximately $21,940 in cash, a 1984 Chevrolet Monte Carlo automobile, and miscellaneous personal property. Dusenbery's claim for compensation for this property is now at issue.

Dusenbery initially filed a Fed. R. Crim. P. 41(e) motion requesting the return of the seized property, which motion was denied. Upon appeal, this court vacated the district court's judgment and remanded the case. *See Dusenbery v. United States*, No. 95-4188, 1996 WL 549818 (6th Cir. Sept. 25, 1996) (unpublished order). We directed that the district court "construe the matter as a civil action seeking equitable relief and determine whether the government provided Dusenbery with actual notice of the various forfeitures." *Id.* at *3

The district court then presided over a telephone deposition of James Lawson, an Inmate Systems Officers at the Federal Correctional Institution in Milan, Michigan, where Dusenbery was incarcerated at the time the alleged notice regarding the cash was delivered in connection with this controversy.

The district court determined that the personal property should have been returned upon Dusenbery's conviction, but some personal items had been destroyed and no forfeiture proceeding had been initiated. In addition, the district court



found that Dusenbery was entitled to the value of the personal property at the time it was seized. More significant, however, at that hearing *Dusenbery admitted that he purchased the items of personal property and the 1984 Monte Carlo with proceeds from drug sales*. The district court then directed the parties to brief the issue whether Dusenbery was entitled to the value of personal property and the vehicle admittedly bought with drug money.

After the case was reassigned to another district judge, the court determined that the notice received at the Milan prison facility was reasonably calculated to notify Dusenbery of the forfeiture action, and that since Dusenbery admitted that he purchased the 1984 Monte Carlo and miscellaneous personal property with drug proceeds, he had *no property rights* in these items. Summary judgment was accordingly granted to the government, and this timely appeal followed.

This court reviews a judgment granting summary judgment de novo and uses the same standards as used by the district court. *See EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1093 (6th Cir. 1998); *Peoples Bank & Trust Co. of Madison County v. Aetna Cas. & Sur. Co.*, 113 F.3d 629, 633 (6th Cir. 1997). Summary judgment is appropriate where "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The party opposing a motion for summary judgment "may not rest upon the mere allegations or denial of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting former Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff" *Id.* at 252.

We conclude first that summary judgment for the government was proper regarding the $21,929 in cash. The government has provided persuasive evidence that a prison mail room employee signed the certified mail receipt. The government has offered the affidavit of James Lawson, an Inmate Systems Officer at the Milan Facility. Lawson attested that he signed the certified mail receipt and described the process for forwarding prison mail to the inmates. Lawson's deposition testimony is consistent with his affidavit.

Notwithstanding Dusenbery's contention that he did not receive actual notice, this notice was "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane*, 339 U.S. at 314. As the district court correctly stated, citing *United States v. Real Property, Tree Top*, No. 96-3757, 1997 WL 702771, at *2 (6th Cir. Oct. 31, 1997) (unpublished opinion), this court does not require the government to show that the mail actually reached an inmate in order to satisfy requirements of due process. Because adequate notice was given, Dusenbery is not entitled to relief on this claim. The *Tree Top* decision was decided after this court's opinion remanding this case to the district court for determination as to the sufficiency of notice and is the most recent reflection of Sixth Circuit law on point.

At the hearing to determine the value of the personal property, Dusenbery admitted that the car and personal property were purchased with drug proceeds. Thus, the sufficiency of notice regarding forfeiture of the Monte Carlo or violation of Dusenbery's due process rights upon the destruction of his personal property are not the issues presented in this case. Instead, the issue is simply whether Dusenbery is entitled to compensation under that admitted circumstance.

Acquisition of property through drug proceeds affects a claimant's right to that property in forfeiture actions. In this



circuit, "one never acquires a property right to [drug] proceeds, which include not only cash but also property secured with the proceeds of illegal activity." *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). *See also United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (Someone who purchases property with drug proceeds "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.").

Dusenbery's admission about drug proceeds, combined with his testimony that he had been unemployed since 1983—two years before any of the items or the car at issue was purchased—leads to the conclusion that the personal property and the car, involved were purchased with drug proceeds. Dusenbery had no property rights, therefore, in the Monte Carlo or the personal property. To order compensation for destruction of this property or improper notice of forfeiture would allow Dusenberyto retain the fruits of illegal activities, his involvement in which is undisputed. Further, as pointed out by the district court, in light of the illegal source of the Monte Carlo and personal property, it would be against public policy to allow Dusenbery to retain property which he obtained as a result of illegal activity. Accordingly, summary judgment for the government was proper regarding all personal property, including cash and the automobile.

Accordingly, the district court's judgment is AFFIRMED.